Nos. 07-1059 & 07-1078

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EURODIF S.A., *et al.*,
Respondents.

USEC, INC., *et al.*,
Petitioners,

v.

EURODIF S.A., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS EURODIF S.A., AREVA NC S.A., AND AREVA NC INC.

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QUESTION PRESENTED

In a uranium enrichment services transaction, an enricher receives unenriched uranium from an electric utility, and returns enriched uranium in which the fissionable isotope has been concentrated according to the utility's specifications. The utility retains title to uranium throughout this process. The enricher charges the utility only for the enrichment processing that it provides; it does not charge any price for uranium, which the utility itself has supplied.

Did the court of appeals correctly hold that the antidumping statute, 19 U.S.C. § 1673 *et seq.*, which imposes duties only on sales of merchandise, does not reach sales of uranium enrichment services?

CORPORATE DISCLOSURE STATEMENT

Eurodif S.A. is owned by AREVA NC S.A. (44.653%) (formerly named COGEMA S.A.), Sofidif (25%), Synatom (11.111%), Enusa (11.111%), and Enea (8.125%). AREVA NC Inc. (formerly named COGEMA, Inc.) is wholly owned by AREVA NC S.A., which is, in turn, wholly owned by AREVA, a publicly held company. Sofidif, Enusa, and Enea are not publicly held companies. Synatom is owned by Electrabel S.A., which is owned by GDF Suez, a publicly held company.

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BRIEF FOR RESPONDENTS EURODIF S.A., AREVA NC S.A., AND AREVA NC INC.

STATUTORY PROVISIONS INVOLVED

Sections 1673, 1677a, and 1677b of Title 19 of the United States Code are reproduced in the appendix to this brief. App. 1a-30a.

STATEMENT OF THE CASE

Eurodif S.A. is a French company that enriches uranium for use by electric utilities in their nuclear reactors. AREVA NC S.A. and AREVA NC Inc. sell enrichment services on Eurodif's behalf.[1] This case concerns the United States Department of Commerce's application of the antidumping statute, which by its express terms reaches only the sale of merchandise, to Eurodif's sale of uranium enrichment services.

A. The Statutory Scheme

First enacted in 1921, *see* Antidumping Act, 1921, ch. 14, 42 Stat. 9 (repealed 1979), the antidumping law addresses international price discrimination in the sale of foreign merchandise. From its inception, including through multiple amendments of the statute, its scope has been restricted to "merchandise . . . sold . . . in the United States." *Id.* § 201(a); 19 U.S.C. § 1673(1).[2]

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[1] Eurodif S.A., AREVA NC S.A., and AREVA NC Inc. are herein collectively referred to as "Eurodif."

[2] In 1979, Congress repealed the Antidumping Act of 1921 and inserted a new antidumping law into the pre-existing Tariff (Cont'd)

Foreign goods are "dumped" if they are sold in the United States for a lower price than in the seller's home market (or, if a home-market price is not available, for less than other specified benchmarks). 19 U.S.C. §§ 1677(34), 1677a, 1677b. Thus, the U.S. sale price of foreign goods is at the crux of dumping. Only a party that sells, and thus sets the price of, foreign goods can engage in price discrimination; hence, only such a party can engage in dumping.

Dumping duties may be imposed on sales of "subject merchandise"[3] only if Commerce determines, using a methodology mandated in the statute, that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." *Id.* §§ 1673(1), 1677a, 1677b; *see also id.* § 1677(34) ("dumping [is] the sale or likely sale of goods at less than fair value").

Only by analyzing the price at which merchandise is sold can Commerce determine if dumping is taking place. Sale price is, of course, fixed by agreement of the parties to the transaction, and such agreements are therefore the focus of a dumping investigation.

(Cont'd)

Act of 1930. Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101, 106, 93 Stat. 144, 150-89 (codified at 19 U.S.C. § 1673 *et seq.* (1994)). The new statute, insofar as relevant here, uses substantially the same language as the 1921 law and was "intended to re-enact the [same] basic standard for imposition of antidumping duties." S. Rep. No. 96-249, at 61 (1979); *id.* at 107.

[3] "[S]ubject merchandise means the class or kind of merchandise that is within the scope of an investigation" under the antidumping law. 19 U.S.C. § 1677(25).

Specifically, Commerce must compare the price at which the merchandise is sold to or in the United States (the "export price," or, in some cases, "constructed export price"),[4] with the "normal value" of the merchandise (generally, the price in the seller's home market). *Id.* §§ 1677a, 1677b. In calculating the U.S. price, Commerce must begin with the "price at which the subject merchandise is first sold." *Id.* § 1677a(a),(b). That price is then subject to specifically enumerated adjustments. *Id.* § 1677a(c),(d).

Once the U.S. price of merchandise is established, Commerce must then compare it with the "normal value" of the merchandise to determine if there has been a sale at less than the latter amount (*i.e.*, a sale at "less than fair value"). 19 U.S.C. § 1677b(a). The preferred measure of normal value is the price at which the merchandise is sold in the exporter's home market. *Id.* § 1677b(a)(1)(B). If home-market sales cannot be used, however, normal value will be based on either the sale price in third-country markets, *id.* § 1677b(a)(1)(B)(ii),(C), or the "constructed value" of the merchandise, *id.* § 1677b(a)(4).[5] The amount, if any, by

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[4] "Export price" and "constructed export price" are referred to herein as the "U.S. price." "Export price" is the price at which merchandise is sold before importation to an unaffiliated purchaser in, or for exportation to, the United States. 19 U.S.C. § 1677a(a). "Constructed export price" is used when the sale occurs after exportation to the United States, or is made by an affiliate of the producer or exporter. *Id.* § 1677a(b).

[5] "Constructed value" is the sum of the seller's: cost of production; selling, general, and administrative expenses; and (Cont'd)

which normal value exceeds the U.S. price is known as the "dumping margin." *Id.* § 1677(35)(A).

If Commerce concludes that subject merchandise was sold at less than fair value, the International Trade Commission must determine whether there has been material injury or a threat thereof to a domestic industry. 19 U.S.C. § 1673(2). If so, Commerce will publish an antidumping duty order that directs Customs officers to assess a duty equal to the dumping margin. *Id.* §§ 1673e(a), 1673d(c)(2).

B. Utilities' Procurement of Low Enriched Uranium

The production of nuclear fuel for use in electricity generation involves five discrete steps: (1) mining uranium ore and milling it into triuranium octoxide (U_3O_8), known as "yellowcake"; (2) converting yellowcake into uranium hexafluoride (UF_6), known as uranium "feed"; (3) processing, or "enriching" feed to create low enriched uranium ("LEU");[6] (4) converting LEU into uranium dioxide (UO_2) pellets; and (5) inserting pellets into fuel assemblies, for consumption in nuclear reactors. *See* Gov't Pet. App. 230a-31a; J.A. 40-41, 261. Only the

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(Cont'd)

profits for producing and selling the merchandise. 19 U.S.C. § 1677b(e). Constructed value was the basis of "normal value" in this case. J.A. 247-48.

[6] "Low enriched uranium" is used to power nuclear reactors. "High enriched uranium," or "HEU," has an assay of 20% or higher and is primarily used for military or research purposes. *See* J.A. 41 n.6.

third step—uranium enrichment—is at issue in this case. *See* Gov't Pet. App. 223a.

Enrichment is the process of concentrating the U_{235} isotope, naturally occurring in uranium, to a level allowing for a controlled chain reaction of nuclear fission in a reactor. A fungible good, uranium feed is primarily composed of U_{238}, a non-fissionable isotope, but also has a U_{235} concentration or "assay" of .711% by weight. To make uranium suitable for use as fuel, it must be enriched until the U_{235} assay reaches a level of 3% to 5%. *See* Gov't Pet. App. 182a; J.A. 41.

No substance is added to uranium feed during the enrichment process. Rather, the U_{235} contained in the feed is gradually concentrated until the desired assay is achieved. This process requires separating the feed into two streams: the LEU, in which the U_{235} has been concentrated, and the leftovers (or "tails"), which have been significantly depleted of U_{235}. The total quantity of U_{235} stays constant throughout the enrichment process; thus, the sum of the U_{235} in the LEU and tails after enrichment is equal to the quantity of U_{235} in the feed at the outset. *See* J.A. 41-42.

The amount of effort expended to enrich feed is measured, according to a standard, industry-wide formula, in "separative work units," or "SWUs." *See* Gov't Pet. App. 183a. The number of SWUs needed for enrichment depends on: the quantity of feed to be enriched; the quantity of LEU to be obtained; and the assays specified for both the LEU and tails. Varying any one of these factors will change the number of SWUs that are required for enrichment. Thus, a utility can

obtain a particular quantity of LEU at a given assay by supplying more feed and buying fewer SWUs, or by supplying less feed and buying more SWUs. *See id.* at 183a-84a; J.A. 178 n.15. Utilities calibrate the relative amounts of uranium feed and SWUs for each transaction in order to minimize their costs. *See* Gov't Pet. App. 205a n.15.

Ordinarily, utilities actively manage the entire nuclear fuel procurement process, contracting with separate vendors for each step of the process. *See id.* at 55a. For the enrichment step, utilities generally enter into SWU (or enrichment services) contracts with enrichers. Under a SWU contract, the utility is responsible for acquiring the requisite uranium feed. It provides its feed to the enricher, specifies the amount of LEU to be delivered and the product and tail assays, and purchases from the enricher the requisite number of SWUs.

SWU contracts were first developed by the U.S. government decades ago, for reasons wholly unrelated to the antidumping law. Under the 1946 and 1954 Atomic Energy Acts, private ownership of nuclear materials was prohibited. *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 665 (1988); Atomic Energy Act of 1946, Pub. L. No. 79-585, § 5(a), 60 Stat. 765. In 1964, however, Congress amended the 1954 Act to allow electric utilities to own the uranium used in their reactors. *See* Private Ownership of Special Nuclear Materials Act, Pub. L. 88-489, 78 Stat. 602. Because the U.S. government was then "the only entity in the world with the facilities to . . . enrich[] uranium," Congress authorized it "to offer 'toll enrichment' services whereby utilities could obtain

unenriched uranium on the open market and have it enriched by the [government] for a fee." *Huffman*, 486 U.S. at 665; *see also* Gov't Pet. App. 186a. But the government "offered no other [goods or] services relating to the production of nuclear fuel." Gov't Pet. App. 186a. Thus, utilities purchased these goods and services separately, *see id.* at 186a; J.A. 278; Gov't Br. 5 n.2, resulting in a series of distinct transactions between utilities and the various commercial entities that mined, milled, converted, and enriched uranium, and fabricated fuel.

Today, utilities have the option of simply buying finished LEU from an enricher pursuant to an enriched uranium product ("EUP") contract. Under such a contract, the utility does not purchase feed on the open market; rather, it pays the enricher a price that covers both the enrichment process as well as the necessary uranium. *See* Gov't Pet. App. 182a-84a.

SWU contracts, however, continue to account for the overwhelming majority of sales made by enrichers.[7] By contracting separately for each step in the fuel production process, utilities can "manage costs and assure a steady and reliable supply of fuel," diversifying their sources and minimizing the risk of supply disruption. *Id.* at 55a.

SWU contracts and EUP contracts are fundamentally different transactions, as the Court of

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[7] *See* J.A. 53 ("Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU."); J.A. 283 (95% of a utility's contracts were for purchases of SWUs, rather than EUP).

International Trade recognized. *See id.* 46a-49a. For example:

- SWU contracts provide that utilities retain title to uranium throughout the enrichment process. *See* C.J.A. 17, 87, 140, 188, 267; Gov't Pet. App. 184a-85a. Under EUP contracts, enrichers hold title to uranium until they transfer ownership of the complete LEU product to utilities. *See* C.J.A. 333, 392.

- SWU contracts require utilities to provide all of the uranium feed necessary for the quantity of LEU that they will receive. *See, e.g.*, C.J.A. 13-14, 83-84, 140, 142, 182-84, 268-70. By contrast, under EUP contracts, enrichers must procure the feed.

- Utilities bear the significant risk of uranium price fluctuations under SWU contracts, but not EUP contracts. *See* Gov't Pet. App. 55a; J.A. 279-80.

- Price is calculated in a SWU contract on a per-SWU basis for the total SWUs necessary to enrich the feed, according to the utility's product and tails assay specifications; no price is charged for uranium. *See* C.J.A. 26, 97, 134, 199, 276. Under an EUP contract, price is based on the weight of LEU, reflecting both enrichment and the necessary uranium. *See* C.J.A. 335-36, 393.

- Since uranium feed is a major component of the value of LEU, *see, e.g.*, Gov't Pet. App 239a, a utility will pay significantly more to an enricher for a given amount and assay of LEU under an EUP contract than under a SWU contract.

C. Proceedings Below

1. Commerce's Initial Determination

In December 2000, USEC filed an antidumping petition with Commerce regarding LEU imported from various countries, including France.[8] J.A. 38. The petition purported to cover transactions under both SWU and EUP contracts. The five SWU contracts between Eurodif and various American utilities generally provide that for a period of approximately five years, Eurodif shall supply a percentage of the contracting utility's total SWU requirements. *See* C.J.A. 9-10, 77, 128-29, 176, 262-63. Each contract stipulates that the utility will provide Eurodif with all necessary uranium feed; the utilities will retain title to the uranium feed throughout the enrichment process; and the price will be determined on a per-SWU basis. Under each contract, Eurodif is to deliver LEU pursuant to periodic notices from the utility specifying the quantity of feed the utility will provide, the quantity of LEU to be

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[8] Commerce later determined that LEU from the other countries was not being sold at less than fair value. *See Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 Fed. Reg. 65886 (Dep't Commerce Dec. 21, 2001).

returned to the utility, and the product and tails assays for each LEU delivery. *See* C.J.A. 11-12, 81-82, 131-33, 179-81, 266.

Eurodif opposed USEC's petition insofar as it covered SWU contracts. Eurodif argued that because the antidumping law operates only against sales of merchandise, SWU transactions, which are sales of services, cannot give rise to dumping duties. *See* J.A. 112-22, Gov't Pet. App. 228a.

Commerce found that the antidumping law reaches SWU transactions. *See* Gov't Pet. App. 220a; *see also* J.A. 238. Its determination rested on two assertions: first, that "the application of the [antidumping law] does not depend on whether a producer/exporter sells an input to the subject merchandise, or the subject merchandise itself," Gov't Pet. App. 241a; and second, that "there is little substantive commercial difference between [SWU and EUP] transactions." J.A. 245. Indeed, Commerce stressed its view that SWU and EUP contracts are "functionally equivalent," since both types of contracts share the objective of "delivery of LEU." Gov't Pet. App. 255a.

Commerce further concluded that imposing dumping duties on SWU transactions would be consistent with its "tolling" regulation. *Id.* at 250a-51a. That regulation—which Commerce abruptly withdrew while the petitions for certiorari were pending in this case, *Withdrawal of Regulations Governing the Treatment of Subcontractors*, 73 Fed. Reg. 16517 (Dep't Commerce Mar. 28, 2008)—provided that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not

control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h).[9] In other words, a toller's transactions will not be used to calculate U.S. price or normal value. Commerce dismissed Eurodif's argument that, under this regulation, enrichers do not own or control the sale of LEU and thus the sale of enrichment services could not be considered a relevant sale under the antidumping law. *See* Gov't Pet. App. 248a.

Commerce also rejected Eurodif's position that no U.S. price or normal value of LEU can be calculated for a SWU transaction because the price term reflects only the value of enrichment. *See id.* at 244a-45a. Commerce, however, faced a conundrum: in its SWU transactions, Eurodif received "a cash payment covering only the value of the enrichment component" of LEU. J.A. 248. Because the subject merchandise is LEU, and not enrichment, Commerce purported to "translate[] prices and costs involved in SWU contracts to an LEU basis, increasing those values to account for the cost of the uranium feedstock involved." J.A. 248. It did so by "assigning a specific monetary value to the natural uranium component" of LEU and adding it to both the SWU price charged to U.S. utilities and the calculated "normal value" of LEU in France. Gov't Pet. App. 257a.

Commerce recognized that "no specific statutory provision" authorized its addition of an assigned uranium value to Eurodif's actual SWU prices and costs, but found that "the absence of such a provision does not render the law inapplicable to Eurodif's SWU contracts. *Id.* at 233a.

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[9] A "toller" (or subcontractor) sells to a "tollee" (or contractor) certain processing of, or material inputs to, subject merchandise. *See* Gov't Pet. App. 48a.

2. Proceedings Before the Court of International Trade

Initial Appeal. On appeal, the Court of International Trade ("CIT") unanimously reversed Commerce's determination as neither supported by substantial evidence nor in accordance with law. *See* Gov't Pet. App. 178a. The court rejected Commerce's finding that SWU and EUP transactions are functionally equivalent because it "fails to take into account a critical difference between the two transactions: what is purchased." *Id.* at 204a. In EUP transactions, the CIT observed, "[u]tilities pay the seller a price that reflects all elements of the value of the LEU." *Id.* at 204a-05a. SWU transactions, by contrast, "do not include the [utility's] cost or responsibility for providing the uranium feed." *Id.* at 205a. Accordingly, SWU "contracts specify that the only payment to be made by the utility is for the enrichment services to be provided, on a price-per-SWU basis." *Id.* Thus, unlike EUP transactions, SWU transactions "do not contemplate the sale of a complete product." *Id.*

The CIT also focused on the inconsistency between Commerce's determination and its tolling regulation and prior related decisions. *See* Gov't Pet. App. 207a. Because a toller does not sell all components of the merchandise's value, the CIT explained, the toller sets only the price of the processing or inputs that it provides, not the price of the subject merchandise. *See id.* at 192a. But in conducting a dumping investigation, Commerce must compare the U.S. price and normal value of subject merchandise, "'not the price of some processing of the subject merchandise.'" *Id.* at 192a n.10

(quoting Decision Memorandum: Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun in the Antidumping Investigation of Polyvinyl Alcohol from Taiwan, August 8, 1995, at 4). Thus, in numerous cases addressing tolling arrangements, "Commerce has recognized that where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *Id.* at 205a-06a. The CIT remanded the determination to Commerce, instructing that "Commerce's decision requires a more persuasive explanation than provided in the agency's determinations." *Id.* at 207a.

Remand Proceedings. On remand, Commerce adhered to its original determination. Gov't Pet. App. 69a-177a. It found its tolling regulation inapplicable to SWU transactions because the tollees (*i.e.*, the utilities) never sell the subject merchandise in the United States. *See id.* at 122a-24a. Commerce held that it could rely on SWU sales to determine whether merchandise is sold at less than fair value because "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Id.* at 126a.

Commerce also found that the SWU transactions constitute a sale of merchandise under *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), in which the Federal Circuit held that, for the purpose of the antidumping law, a sale requires both transfer of ownership and consideration. *See* Gov't Pet. App. 134a. Commerce asserted that under SWU contracts, the utilities retain title to the uranium feed they provide

until delivery of the associated LEU. *See id.* at 132a. Relying on this point, the agency inferred that "[t]he enricher, by contrast, would have rights as to the LEU" until delivery, and thus "that the enrichers transfer title to, and ownership of, the complete LEU." *Id.* at 133a, 134a.

The CIT unanimously rejected Commerce's remand redetermination. *Id.* at 67a. The court found no "evidentiary or legal basis" for Commerce's "conclusion that the enricher obtains ownership over the LEU and then sells it to the utility." *Id.* at 45a. Rather, the CIT held, "the enricher does not obtain ownership of the LEU enriched under SWU contracts," and thus "the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise under *NSK*." *Id.* at 45a. The CIT also again rejected Commerce's finding that SWU and EUP contracts are "functionally equivalent." "The SWU transaction," the CIT noted, "accounts only for the value of the enrichment processing," not the value of the LEU itself, as in an EUP transaction. Gov't Pet. App. 47a.

Addressing whether Commerce could treat a sale of enrichment services as a cognizable sale of merchandise, the CIT observed that "utilities manage the entire process of creating nuclear fuel. . . . Enrichment is merely one step in this process, and the utilities obtain it by providing a raw material to a subcontractor and paying for the service of enrichment." *Id.* at 55a. Thus, there is no "basis for determining that the tolling arrangements at issue here"—*i.e.*, SWU transactions—"constitute sales that may be considered equivalent to the full-value sale of a finished product."

Id. at 56a. "[T]he fact that the utilities do not . . . sell the finished product, but rather consume it," the CIT held, does not allow Commerce to impose dumping duties on sales of a processing service. *Id.*

3. Interlocutory Appeal and Rehearing Before the Federal Circuit

On interlocutory appeal ("*Eurodif I*"), the Federal Circuit unanimously affirmed, holding that "the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods," and thus outside the scope of the antidumping law. Gov't Pet. App. 24a. Like the CIT, the Federal Circuit rejected petitioners' contention that title to LEU passes from Eurodif to the utilities, finding that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 20a. The court also observed that the United States had successfully argued in a prior case that SWU transactions are not sales of goods, and thus not subject to the Contract Disputes Act. *See id.* at 17a-18a (discussing *Fla. Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002)). The antidumping law was necessarily inapplicable here as well, the Federal Circuit held, where the "utilities bought [SWUs] from enrichers" and "delivered unenriched uranium and monetary compensation to enrichers in return for enrichment services." *Id.* at 24a.

While rehearing petitions were pending, this Court issued its decision in *National Cable & Telecommunications Association v. Brand X Internet*

Services, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. The Federal Circuit granted rehearing for the sole purpose of addressing *Brand X*, and in all other respects affirmed its prior decision. *See* Gov't Pet. App. 30a. The full court denied rehearing *en banc*. *Id.* at 29a-35a.

On rehearing ("*Eurodif II*"), the Federal Circuit reaffirmed that SWU contracts are not subject to the antidumping law. It expressly found that "the antidumping duty statute *unambiguously* applies to the sale of goods and not services." *Id.* at 33a (emphasis added). Pointing to the "inescapable conclusion . . . that the enrichers do not 'sell' LEU to utilities pursuant to . . . SWU contracts," the court "reject[ed] Commerce's application of the antidumping duty statute to the SWU contracts." *Id.* at 33a-34a.

4. Subsequent Proceedings

On further remand, the CIT instructed Commerce to "explain how its final determination and order on remand has eliminated all SWU transactions" as required by *Eurodif I* and *Eurodif II*. Gov't Pet. App. 2a. When Commerce declined to modify the antidumping duty order accordingly, the CIT again remanded to Commerce. After Commerce issued a conforming antidumping duty order, the CIT entered judgment. *Id.* at 2a-3a.

USEC and the United States appealed to the Federal Circuit. The court dismissed the appeal as unripe, explaining that "the issues appellants raise . . . concern only the application of [*Eurodif I and II*] to future entries of [LEU]." *Id.* at 2a.

This Court granted the petitions for writs of certiorari on April 21, 2008.

SUMMARY OF ARGUMENT

Section 1673 of the antidumping law permits the Department of Commerce to impose dumping duties only if "merchandise [is] sold" at less than fair value. 19 U.S.C. § 1673. This phrase unambiguously requires a transfer of ownership in a tangible good and does not reach the sale of uranium enrichment services. Accordingly, Commerce's contrary interpretation of the statute is foreclosed under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the Federal Circuit held.

While petitioners argue that the operative words of section 1673 are ambiguous and that Commerce's interpretation of the provision therefore must be accorded deference, the ordinary meanings of the terms "merchandise" and "sold" require a transfer of ownership. Petitioners rely on a handful of cases construing unrelated statutes and involving transactions that were not structured as direct sales but nonetheless accomplished a transfer of ownership. Eurodif's SWU transactions, by contrast, involve no transfer of ownership and were not structured to avoid the antidumping law. They are an exchange of enrichment

services for money. The utilities with whom Eurodif contracts provide uranium feed for enrichment; the enrichers do not own either the feed or the LEU, and thus cannot transfer ownership of it.

The plain meaning of section 1673 is consistent with the law's structure and purpose, as well as the construction given to other statutes regulating sales of merchandise. Several provisions of the antidumping law and a companion trade statute (the countervailing duty law) demonstrate not that Congress blithely sought to subject every conceivable transaction to dumping duties, but rather that it crafted the scope of the statute with precision. Moreover, limiting the antidumping law to the sale of merchandise, as Congress instructed, ensures that duties will be imposed only against an entity that actually sells merchandise in this country at a discriminatory price—the fundamental concern of the statute.

Petitioners' related contention, that Commerce can treat a transaction for a single component of a manufacturing process as "merchandise . . . sold," is contrary to the plain meaning of section 1673. As Commerce itself has repeatedly acknowledged until this case, the antidumping law requires it to compare the price and normal value of merchandise, not of the processing of the merchandise. While the United States has withdrawn its regulation addressing this point and seeks to disavow its position before this Court, it cannot simply ignore the text and logic of the statute.

Nothing about Eurodif's SWU contracts somehow injects ambiguity into section 1673 or allows Commerce

to treat a sale of uranium processing services as a sale of merchandise. As both courts below found, these contracts establish on their face that Eurodif never acquires or transfers title to uranium feed or LEU, and the price term in the contracts confirms the utilities' sole ownership of the uranium. The substance of Eurodif's contracts is consistent with their form; under the SWU contracts, utilities provide Eurodif with the feed they want enriched, and the utilities bear the cost and risk associated with these purchases. Indeed, for these very reasons, the United States has repeatedly taken the position, and courts have agreed, that SWU transactions are sales of enrichment services, not LEU.

Petitioners also claim that the antidumping law can be read to cover SWU transactions because they are supposedly equivalent to EUP transactions. That contention is contradicted by the language of the contracts themselves and by their economic realities, as the courts below found.

Not only does the text of section 1673 unambiguously exclude SWU contracts for enrichment services, but Commerce was forced to disregard the statutory requirements for calculating dumping margins in its attempt to stretch the statute to cover these contracts. The statute directs Commerce to use the actual price at which merchandise is sold, subject to enumerated adjustments, in determining whether dumping has occurred. Commerce could not and did not do so here; because Eurodif never sold LEU and therefore never charged a price for it, Commerce assigned an artificial value to the uranium feed that Eurodif processed. Commerce's resort to this unauthorized maneuvering

confirms that Congress did not intend for the statute to apply to these transactions.

Even if this Court were to identify some ambiguity in the plain words of section 1673, Commerce's application of that provision to the facts here is unreasonable and thus fails under step two of *Chevron*. The agency's characterization of Eurodif's contracts has no basis in the record, and its construction of the statute ignores the key aim of the antidumping law. Because Eurodif does not set the price for the full value of LEU, it cannot engage in price discrimination, and its sales of processing services are thus outside the ambit of the statute.

Finally, even if policy consequences could be deemed relevant to ascertaining the plain meaning of section 1673, petitioners' claims on this front are misplaced. The Federal Circuit's interpretation of section 1673 does not create any "loophole" in the antidumping law; in circumstances where production is segmented into separate transactions for raw materials and processing, any applicable dumping duties could be imposed upon the first downstream sale of subject merchandise. Nor is any purported risk of threatened imports of Russian LEU a reason to misconstrue the antidumping law's clear language. Even without resorting to dumping duties, the Executive possesses ample authority under existing law to restrict such imports, and Congress is considering legislation that would do so as well. Moreover, expansion of the antidumping law in the manner proposed by petitioners would be inconsistent with the United States' international obligations and

would undermine the principles of competition embodied in the antitrust laws, to the detriment of U.S. consumers and the economy as a whole.

ARGUMENT

I. SECTION 1673 OF THE ANTIDUMPING LAW UNAMBIGUOUSLY LIMITS ANY FINDING OF DUMPING TO TRANSACTIONS INVOLVING A TRANSFER OF OWNERSHIP IN A TANGIBLE GOOD.

As the courts below correctly held, SWU transactions are sales of only enrichment services, not merchandise, and therefore the antidumping law by its express terms does not reach those sales. Gov't Pet. App. 33a. Under *Chevron*'s two-step framework for reviewing agency interpretations of a statute, a court must first ask whether the statute is ambiguous with respect to the question at issue. *See Brand X*, 545 U.S. at 986. If the terms of the statute are clear, the agency must adhere to them. If "the devices of judicial construction have been tried and found to yield no clear sense of congressional intent," a reviewing court must defer to the agency's interpretation, if it is reasonable.[10] *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Brand X*, 545 U.S. at 986.

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[10] The United States argues that "the antidumping-duty statute does not directly speak to the precise question" of whether "goods . . . acquire[d] through contract-manufacturing arrangements" are exempt from the antidumping law. Gov't Br. 23. But a statute is not ambiguous simply because Congress has not spelled out every possible circumstance in which it might be applied. Were that so, deference would be due an agency in virtually every instance.

Section 1673 is unambiguous in its scope: it covers only transactions that involve a transfer of ownership in a tangible good, and not sales of services. Because Congress was clear on this point, no deference is owed to Commerce's effort to fit a services transaction into the ambit of the antidumping law. *See Chevron*, 467 U.S. at 842-43.

A. The Phrase "Merchandise . . . Sold" Is Unambiguous.

Section 1673 expressly conditions the imposition of dumping duties on a finding that "foreign merchandise" is "sold in the United States at less than its fair value." 19 U.S.C. § 1673(1); *see also id.* § 1677(34) ("dumping" entails a "sale of goods"). The terms "sold" and "merchandise" are not defined in the statute. Accordingly, they should be "interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, __ U.S. __, 127 S. Ct. 638, 643 (2006).

The term "merchandise" means a tangible good or commodity that can be bought and sold. *See, e.g.*, THE SHORTER OXFORD ENGLISH DICTIONARY (1st ed. 1933) ("[t]he commodities of commerce; movables which may be bought and sold"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (unabridged) ("manufactured goods bought and sold in any business"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002) (unabridged) ("commodities or goods that are bought and sold in business").

The term "sale" means a transfer of ownership in property in exchange for consideration. *See* WEBSTER'S

NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1923) (unabridged) ("a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price"); THE SHORTER OXFORD ENGLISH DICTIONARY (1st ed. 1933) ("the exchange of a commodity for money or other valuable consideration"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (unabridged) ("transfer of such ownership of and title to . . . personal property (as existing identifiable movable and tangible or fungible goods) under a contract by the seller to the buyer for a price"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (unabridged) ("transfer of property for money or credit").

The Federal Circuit has confirmed that "Congress intended to give the term ['sold'] its ordinary meaning," namely, a transfer of ownership for consideration. *NSK*, 115 F.3d at 975. In light of the lack of any ambiguity on this point, Commerce's reading of the statute as encompassing a transaction for processing services alone is due no deference. The plain language of the statute resolves this case, as the Federal Circuit held below.

Rather than grapple in any depth with the text of the statute, petitioners instead claim to find ambiguity in section 1673 based on a handful of cases interpreting the term "sale" in unrelated statutory schemes. *See* Gov't Br. 29, 34-35; USEC Br. 30-31, 35. Petitioners rely on these cases for two points: that the term "sale" covers any transaction resulting in delivery of a commodity for a price, regardless of whether there is a transfer of ownership; and that only the substance, not the form,

of a transaction matters in determining whether it constitutes a "sale." *See* Gov't Br. 28-30, 34-35; USEC Br. 34-35.[11]

Preliminarily, the cited cases do not hold that the form of transactions can simply be ignored as a matter of course. *See* Gov't Br. 28-30, 34-35; USEC Br. 34-35. This Court has endorsed disregarding the actual terms of a contract only in limited circumstances not present here, such as where the form is "shaped solely by" an intent to circumvent a regulatory scheme and has "meaningless labels attached." *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978).

In any event, the key factor that led this Court to find a sale of goods in petitioners' cases, an effective transfer of ownership in a regulated asset, is missing here. In *United Gas v. Continental Oil Co.*, the Court examined a sale of natural gas strategically recast as a sale of leasehold interests in gas reserves. 381 U.S. 392, 400-01 (1965). At issue was whether the leasing arrangement fell within the Federal Power Commission's authority to regulate "the sale . . . of natural gas." *Id.* at 399-400. The "determinative economic fact," the Court explained, was that "the sales of these leases . . . accomplished the transfer of large amounts of natural gas." *Id.* at 401. Similarly, in *SEC v. National Securities, Inc.*, the Court treated a deceptively

[11] To the extent petitioners are suggesting that the term "sale" is inherently ambiguous for purposes of *Chevron*, that argument would plainly prove too much. Congress has used the term "sale" or its variants in many statutes, and the few cases that petitioners cite surely do not render it open to agency interpretation in every instance.

structured stock transfer as a "purchase or sale" of a security subject to SEC regulation. 393 U.S. 453, 467-68 (1969). Because the transaction at issue resulted in investors "becoming shareholders in a new company," the "purchase or sale" regulatory criteria were met. *Id.* at 467.

In contrast, the SWU transactions before Commerce do not effect a transfer of ownership in uranium. Nor were they designed to avoid application of the antidumping regime. Thus, these cases are inapposite and do not render section 1673 ambiguous.

USEC's related claim that the "technicalities of title" are of no consequence, USEC Br. 35, also fails. The economic realities and the governing contractual agreements in this case are fully consistent: both establish that no transfer of title or sale of LEU occurs. *See Frank Lyon*, 435 U.S. at 576-80. Petitioners' attempt to fit SWU transactions into a narrow line of cases involving "arbitrary labels and dealings that have no economic significance," *Id.* at 583, is therefore misplaced.[12]

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[12] *Boulware v. United States*, __U.S.__, 128 S. Ct. 1168, 1181 (2008), *see* Gov't Br. 35, USEC Br. 34, is likewise of no aid to petitioners. *Boulware* simply reiterated *Frank Lyon*'s observation that "tax classifications . . . turn on 'the objective economic realities of a transaction.'" *Boulware*, 128 S. Ct. at 1175. It provides no basis to recharacterize transactions where, as here, their structure reflects economic realities. Similarly, in *United States v. Sealy, Inc.*, *see* USEC Br. 34, the Court merely concluded that the transactions' economic substance established an impermissible horizontal restraint. 388 U.S. 350, 352-54 (1967).

Finally, *Gray v. Powell*, 314 U.S. 402 (1941), is particularly unhelpful to petitioners' effort to privilege supposed substance over form. In *Gray*, this Court considered whether a railroad's consumption of coal mined by a third party from land leased by the railroad triggered tax obligations accruing on a "sale *or other disposal* of bituminous coal." *Id.* at 414-17 (emphasis added). Although the railroad argued that no "sale" occurred because it continuously held title to the extracted coal, the Court noted that the statute applied to "'other disposal,' as well as sale," and that coal "may be disposed of" without a transfer of title. *Id.* at 416.

B. The Antidumping Law's Structure and Purpose Confirm Its Plain Meaning.

1. Related Statutory Provisions Underscore Congress's Intent That the Phrase "Merchandise . . . Sold" Be Given Its Ordinary Meaning.

While petitioners argue that two related provisions of the antidumping law indicate that Congress intended section 1673 to reach a broad swath of transactions, just the opposite is true. Those two provisions, along with a provision in a companion trade statute, confirm that Congress intended the phrase "merchandise . . . sold" to have its settled and ordinary meaning.

Petitioners first contend that an amendment to section 1673 providing that a "leasing arrangement . . . that is equivalent to the sale of the merchandise" may be subject to a dumping determination, 19 U.S.C. § 1673, shows that Congress was "concerned not just

with 'sales' in the narrowest sense."[13] USEC Br. 33; *see also* Gov't Br. 30-31. To the contrary, this provision confirms that Congress intended to cover only transactions within the ordinary meaning of a sale of merchandise, as shown by its view that even transactions "equivalent to the sale of . . . merchandise" warranted clarification as falling within the statute's reach.

Second, the United States argues that the inclusion of "likely" sales of merchandise within the statute's reach suggests an intent to also cover the transactions here. The statute covers likely sales so that Commerce may act when the terms of a sale have been agreed upon, but the sale has not yet been consummated. *See* H.R. Rep No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5137-38. But the nub of petitioners' argument is not that a sale of merchandise is likely to occur; it is that the phrase "merchandise . . . sold" is somehow broad enough to include a contract for processing services. In any event, this point proves too much. The United States claims that the likely-sale provision supports its interpretation because "it is impossible to know in advance the form that [a] transaction will take." Gov't Br. 30. That Congress expanded the temporal scope of the antidumping law in no way suggests that it also meant to cover every

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[13] The legislative history of this provision indicates that it was "intended to clarify the applicability of [the antidumping] law[] to sham leases or leases which are tantamount to sales." H.R. Rep. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5137-38; *see also id.* at 6; H.R. Rep. No. 98-1156, at 165 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5282. The Committee report explained that "[b]ecause of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. No. 98-725, at 11 (1984).

potential transaction, on the theory that some of them, once consummated, might constitute a sale of merchandise.

While not referenced by petitioners, there is a provision in the companion countervailing duty law that does illuminate the scope of the antidumping law. The countervailing duty law imposes duties upon the *importation* of subsidized merchandise into the United States, whereas the antidumping law requires that merchandise be *sold* here. *Compare* 19 U.S.C. § 1671, *with id.* § 1673. The countervailing duty law also defines "countervailable subsidies" to include the provision of services, whereas the antidumping law operates only against the sale of merchandise. *Compare* 19 U.S.C. § 1677(5)(D)(iii), *with id.* § 1673. Congress's determination that the countervailing duty law should reach more broadly in both respects demonstrates that it did not intend for dumping duties to be assessed upon the mere entry of merchandise into the United States, or the sale of services alone. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.") (internal quotation marks omitted).

2. The Antidumping Law's Purpose Is Furthered by Giving "Merchandise . . . Sold" Its Ordinary Meaning.

Petitioners also contend that the ordinary meaning of section 1673 is at odds with the purpose of the antidumping statute. *See* Gov't Br. 32-34; USEC Br. 29-30. References to broad goals of a statute, however, provide no basis for disregarding its plain text. Courts must presume that "a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

Moreover, petitioners' interpretation does not promote the antidumping law's purpose: "to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States . . . at less than fair value." *SKF USA Inc. v. United States*, 180 F.3d 1370, 1371 (Fed. Cir. 1999). Even if it were true that a SWU contract and an EUP contract had a similar effect on a domestic industry, *see* Gov't Br. 33, an enricher cannot itself sell foreign merchandise in this country at a discriminatory price. In SWU transactions, enrichers sell, and set the price of, only enrichment, not LEU. Because enrichers are not price-setters of LEU, they cannot be price-discriminators as to LEU, and thus their conduct does not implicate the fundamental concern of the antidumping law.

C. Section 1673's Plain Meaning Is Further Confirmed by the Construction of Other Statutes Regulating Sales of Merchandise.

Other statutes regulating sales of merchandise have likewise been held inapplicable to sales of processing services, suggesting that Congress intended the phrase "merchandise . . . sold" to have the same meaning. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). For example, the Robinson-Patman Act ("RPA"), a statute that is in key respects the domestic equivalent of the antidumping law, addresses price discrimination, and applies only when "commodities are sold . . . within the United States." 15 U.S.C. § 13(a). Courts have repeatedly held that processing operations are service transactions outside the scope of the RPA, even when a processor provides tangible inputs. *See First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1037 (7th Cir. 1989); *Aviation Specialties Inc. v. United Techs. Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978); *Gen. Shale Prods. Corp. v. Struck Constr. Co.*, 132 F.2d 425, 428 (6th Cir. 1942).

Of particular significance here are two additional statutes—the Uniform Commercial Code and the Contract Disputes Act—which have been held, at the United States' behest, not to reach SWU transactions because no goods are sold. *See infra* Point II.A.3.

D. Commerce May Not Treat a Transaction for a Single Component of a Manufacturing Process as "Merchandise . . . Sold."

The United States contends that Commerce can subject each distinct component of a "contract manufacturing" process to dumping duties, provided that there is eventual "entry," "delivery," or "acquisition" of the product in the United States. Gov't Br. 19, 25-28, 48. But neither section 1673, nor any other provision of the antidumping law, makes any reference to those events as a trigger for the imposition of dumping duties. Instead, the statute requires that subject "merchandise [be] sold" to or in the United States. 19 U.S.C. § 1673.

Thus, the Federal Circuit, the CIT, and even Commerce have concluded that absent such a sale, the mere delivery or acquisition of foreign merchandise cannot give rise to dumping duties. For example, in *NSK*, U.S. parties acquired foreign merchandise that had been given to them as free samples. The Federal Circuit held that the provision of zero-priced samples could not be used to calculate the U.S. price of subject merchandise, since the merchandise had not been "sold" given the absence of any consideration. *See NSK*, 115 F.3d at 973-75. Similarly, Commerce, the CIT, and the Federal Circuit have held that dumping duties cannot be assessed on merchandise imported to the United States but then re-exported without being sold. *Torrington Co. v. United States*, 818 F. Supp. 1563, 1573 (Ct. Int'l Trade 1993), *aff'd* 82 F.3d 1039, 1047 (Fed. Cir. 1996); *Antifriction Bearings (other than Tapered Roller Bearings) and Parts thereof from the Federal Republic of Germany*, 56 Fed. Reg. 31692, 31743 (Dep't Commerce Jul. 11, 1991).

Moreover, the United States' position is inconsistent with the statutory criteria for determining whether merchandise has been sold at less than fair value. Commerce itself has acknowledged this very point until this case, repeatedly concluding that tolling transactions are not cognizable under the antidumping law because "a subcontractor's or toller's price does not represent all elements of value." Response to Court Remand, *Taiwan Semiconductor Mfg. Co., Ltd v. United States*, No. 98-05-02184, slip. op. at 5 (June 2, 2000)]. Thus, a subcontractor is not "in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Id.* Accordingly, Commerce has concluded that it "*[does] not consider the 'sale' between the subcontractor and . . . contractor to be a sale of subject merchandise at all.*" *Id.* (emphasis in original).

Commerce expressly tied this conclusion to the text of the antidumping statute. It noted that the statute "define[s] 'export price' and 'constructed export price' as the price at which the subject merchandise is first sold to an unaffiliated purchaser." *Id.* at 3 (emphasis omitted). Pursuant to this definition, Commerce explained, the price cannot be derived from a subcontractor's sale, "[b]ecause a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs." *Id.*; *see also* Gov't Pet. App. 192a n.10 ("The statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold in the home or third country markets, not the price of some processing of the subject merchandise.").

The United States now claims that Commerce's prior interpretations of the statute are irrelevant because Commerce withdrew its tolling regulation more than seven years after the transactions covered in its investigation. *See* Gov't Br. 39-40 & n.7. Commerce's disavowal and withdrawal of its tolling regulation is an "irrational departure" from its clearly articulated policy on tolling transactions. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). Moreover, because Commerce's current interpretation of section 1673 "conflicts with the agency's earlier interpretation, [it] is entitled to considerably less deference than a consistently held agency view." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Commerce simply wishes to attach duties to transactions that, as its own decisions and (now withdrawn) regulation recognize, are not sales of merchandise and cannot be used to determine the price of such merchandise. But Commerce, like any agency, cannot simply disregard clear directives from Congress in pursuit of its own policy goals.

The United States also asks this Court to disregard its tolling regulation and decisions because they addressed how Commerce should calculate U.S. price and normal value, not whether merchandise would be excluded from a dumping investigation. Gov't Br. 40-41. This distinction, however, is of no consequence to the question at bar. As the CIT recognized, since the antidumping law prevents Commerce from basing U.S. price and normal value on SWU transactions, those transactions cannot give rise to dumping duties. *See* Gov't Pet. App. 206a; *cf.* Gov't Br. 40 n.7. The tolling regulation and decisions establish that the price charged by a subcontractor (or toller) for a single component of a "contract manufacturing" process is not the price of

subject merchandise itself, and hence the toller's sale is not cognizable under the antidumping law. Gov't Pet. App. 206a; *cf.* Gov't Br. 40 n.7.

The United States cannot avoid the logic or statutory directives behind the tolling regulation and decisions simply by pointing to supposed vague purposes of the antidumping law. *See* Gov't Br. at 41-42. The unique circumstances of this case—namely, that no party sells the subject merchandise in the United States—do not allow Commerce to rewrite the terms of the statute.[14]

II. EURODIF'S SWU TRANSACTIONS ARE NOT SALES OF MERCHANDISE.

As demonstrated in Point I, the antidumping statute unambiguously precludes the imposition of dumping duties on a sale of processing services alone. Contrary to petitioners' contentions, nothing about Eurodif's SWU contracts allows a different result here.

First, both on their face and in substance, these contracts establish that Eurodif never acquires

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[14] Nor can the United States avoid the plain language of the antidumping law by pointing to its "broad range of alternatives" for calculating a dumping margin "where prices are not available for that purpose." Gov't Br. 42. While Commerce may impose dumping duties on, *inter alia*, a lease of merchandise that is equivalent to a sale, 19 U.S.C. § 1673, or upon resale of merchandise in the U.S. market by a buyer affiliated with the producer, *id.* § 1677a(b), Eurodif's SWU transactions do not fall within these provisions. Indeed, the statutory methodology effectively precludes calculation of a dumping margin in the circumstances here. *See infra* Point II.C.

ownership of uranium, in either unenriched or enriched form, at any time during the transaction. Thus, it could not transfer ownership back to utilities. Nor can the transformation of feed to LEU or the inherent fungibility of feed somehow confer ownership of LEU on an enricher when its contracts say otherwise.

Second, SWU transactions are not, as petitioners urge, "functionally equivalent" to EUP transactions. The crucial distinction between the two is that in SWU transactions, utilities supply their own feed and purchase only SWUs. In EUP transactions, utilities purchase LEU. Only through SWU transactions can utilities control each step of the process of procuring nuclear fuel, in order to manage risk and minimize costs.

Third, to convert SWU transactions into sales of LEU, rather than mere enrichment services, Commerce assigned an artificial value to uranium and added it to Eurodif's actual SWU prices and costs. That maneuver was inconsistent with the undisputed facts respecting Eurodif's SWU transactions and the antidumping law's provisions governing the calculation of U.S. price and normal value.

Finally, Commerce's recharacterization of SWU transactions as sales of merchandise lacks any basis in the record and is unreasonable. Accordingly, even if this Court were to review Commerce's interpretation of section 1673 under step two of *Chevron*, it could not withstand scrutiny.

A. The SWU Transactions Do Not Transfer Ownership of LEU.

1. On Their Face, Eurodif's SWU Contracts Vest Title to Uranium Solely in the Utilities.

The United States contends that Eurodif's SWU contracts somehow vest enrichers with title to finished LEU during the period after production and prior to delivery. Gov't Br. 45-46; *cf.* USEC Br. 49-50. Neither the contracts themselves nor any other record evidence supports that conclusion. Gov't Pet. App. 46a.

Contrary to the United States' suggestion, Gov't Br. 45-46, the SWU contracts nowhere provide that title to LEU "passes" or "transfers" to utilities from any other entity. *See* C.J.A. 17, 87, 140, 188, 267. In a SWU transaction, a utility must independently acquire, and supply to an enricher, all of the feed needed for the LEU that the utility will receive.[15] Gov't Pet. App. 196a. Eurodif's SWU contracts expressly state that the utilities shall retain title to the uranium feed they provide for processing. C.J.A. 17, 87, 140, 188, 267. Title remains uninterrupted throughout the enrichment process. Accordingly, "[t]he feed uranium does not become an asset of the enricher, nor is it ever reflected as such on

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[15] Petitioners claim that enrichers may deliver LEU before receiving a feed delivery from the utility. Gov't Br. 47; USEC Br. 49. That did not occur here. *See* C.J.A. 607-08. Similarly, while petitioners claim that LEU is not identified at the time of importation as belonging to any particular customer, Gov't Br. 47; USEC Br. 50 n.13, all of Eurodif's imports were earmarked for specific customer deliveries, *see, e.g.*, C.J.A. 424.

the enricher's books and records," as Commerce verified. Gov't Pet. 185a & n.5; *see also* J.A. 119-20, 126-30. At the moment that the utility's feed is "deemed to have been enriched," the utility holds title to the "associated" LEU. C.J.A. 17, 87, 140, 188, 267.

The price term in Eurodif's SWU contracts underscores that only enrichment services are sold. Price is calculated on a per-SWU basis, and represents the total SWUs necessary to enrich the amount of feed the utility provides into the quantity of LEU it desires, at the product and tails assays that it specifies. C.J.A. 26, 97, 134, 199, 276. The contracts do not contain any price term covering uranium, and the total price charged reflects only the value of enrichment and related items.[16]

For all these reasons, as the Federal Circuit found, there is no "intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Gov't Pet. App. 20a; *see also id.* at 44a ("the contractual provisions . . . suggest an intention to establish a continuous chain of ownership in the utility"). Accordingly, the essential element of a sale—a transfer from the enricher to the utility of ownership in finished LEU—is missing from these SWU transactions.

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[16] The contracts provide that the price also includes such things as packaging, transport, and storage of feed. *Id.*

2. In Substance, Eurodif's SWU Contracts Provide for Sales of Enrichment Services.

Not only the literal terms of these SWU contracts, but also "the true nature of the transaction[s]," make clear that they are sales of enrichment services, not LEU. *Fla. Power*, 307 F.3d at 1374. The true "economic realities" of SWU transactions are determined by the parties' actual economic benefits and burdens. Pursuant to these contracts, utilities gain only enrichment services, and enrichers charge for only those services. The substance of SWU transactions is thus markedly different from EUP transactions, in which utilities gain finished LEU for a price that reflects the full value of that product. Moreover, in SWU transactions, utilities bear all of the risks associated with the purchase and ownership of uranium, further demonstrating that enrichers do not own the uranium and thus cannot sell it to utilities. *See generally infra* Point II.B.

Indeed, USEC itself has recognized elsewhere that SWU transactions are not sales of LEU. As it explained in comments submitted to Commerce in a different antidumping case involving uranium, "enriched uranium *per se* is generally not sold within the United States. Instead, utilities typically obtain nuclear fuel by purchasing natural uranium and conversion, enrichment and fabrication services separately." J.A. 137. And in its 2000 Annual Report, USEC observed that "[g]enerally, title to uranium provided by customers for enrichment purposes does not pass to USEC." J.A. 58. As the CIT observed, USEC also "has required its utility

customers to pay all property tax on what it views, correctly, as the 'customer's feed.'" Gov't Pet. App. 185a n.5.

Rather than confront the true substance of these contracts, petitioners focus primarily on two ancillary aspects of SWU transactions: first, that enrichment results in a "substantial transformation" of uranium, USEC Br. 39-43, and second, that uranium feed is, by nature, a fungible substance, Gov't Br. 48-50; USEC Br. 43-48. Neither feature can convert a SWU transaction into a sale of complete LEU.[17]

Transformation of feed to LEU. While enrichment concentrates the U_{235} naturally occurring in uranium feed, it in no way follows that enrichers have sold finished LEU, as opposed to a processing service. Whether there has been substantial transformation of a raw material is relevant to whether (and where) a new good has been manufactured. *See Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908) (analyzing whether corks were manufactured in the U.S.); *Hartranft v. Weigmann*, 121 U.S. 609 (1887) (analyzing whether shells were manufactured in England). But substantial transformation has nothing to do with whether a good has been *sold*.

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[17] Petitioners also note that an enricher may use slightly more or less feed than a utility provided when enriching uranium—practices known as "overfeeding" or "underfeeding." *See* Gov't Br. 47; USEC Br. 45. These internal operations, however, have no bearing on what is sold. Even if an enricher were to overfeed or underfeed, the utility customer purchases, and pays for, the exact amount of SWUs needed to enrich the feed that it provides into the LEU that it desires. *Fla. Power*, 307 F.3d at 1373.

While USEC claims that substantial transformation allows Commerce to treat the sale of a processing service as a sale of merchandise, *see* USEC Br. 41, this view is inconsistent with Commerce's prior practices. In earlier cases involving substantial transformation of raw materials by a subcontractor, Commerce held that the subcontractor does not make a cognizable sale under the antidumping law. *See* Gov't Pet. App. 201a (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998)) *Certain Pasta from Italy*, 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998)). Where, as here, a subcontractor never acquires ownership over the raw materials used to make a finished product, and its pricing does not reflect the full value of that product, the antidumping law's sale-of-merchandise requirement is not satisfied merely because a subcontractor creates the product's "essential character."[18] *See* Gov't Pet. App. 201a-02a.

Inherent fungibility of uranium feed. Petitioners claim that the fungible nature of uranium feed somehow

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[18] USEC also argues that 19 U.S.C. § 2114b(5), which defines "services" as "economic activities whose outputs are other than tangible goods," suggests that SWU transactions must be treated as sales of merchandise. *See* USEC Br. 42. That definition is expressly confined to the "purposes of this section," *id.*, not to other trade laws. Moreover, USEC fails to acknowledge that section 2114b(5) expressly identifies "construction" and "engineering" as examples of services, demonstrating that, even under that provision, a service may result in the delivery of something tangible. Additionally, USEC's argument is inconsistent with the United States' position in negotiating the WTO General Agreement on Trade in Services ("GATS"). *See* J.A. 181-82, 190, 217.

makes enrichers the owners of LEU. *See* Gov't Br. 45-50; USEC Br. 43-48. It is undisputed that utilities own the uranium they furnish to enrichers in SWU transactions. For the uranium (in unenriched or enriched form) to become the property of enrichers, the utilities must relinquish ownership and enrichers must accept it. Neither condition is present here. Although the specific lot of LEU delivered to a utility "bears no necessary relationship to the unenriched uranium the utility furnished," Gov't Br. 48; *see also* USEC Br. 45, that fact does not effectuate a change in ownership. The enrichment process does not differentiate among particular lots of uranium feed simply because all have identical physical characteristics.

The bailment cases relied on by petitioners, Gov't Br. 48-49; USEC Br. 45-48, do not suggest otherwise; they address only who holds title to goods in the absence of any indication of the parties' intent. For example, *Powder Co. v. Burkhardt*, 97 U.S. 110 (1877), concerned whether the transfer to a manufacturer of fungible raw materials constituted a bailment where the parties' "agreement contain[ed] no reservation of title in the goods until they should be manufactured." *Id.* at 119. Lacking any clear manifestation of intent by the parties as to who owned the raw materials, the Court concluded that "the materials, when there was no stipulation to the contrary, should be taken to be" the manufacturer's.[19] *Id.*

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[19] *Burkhardt* also reflected an interest in protecting a third-party creditor who had seized the disputed property to satisfy a debt. 97 U.S. at 118-19. That concern is wholly absent here.

Sturm v. Boker, 150 U.S. 312 (1893), likewise leaves no doubt that the parties' intent as to ownership is controlling. There, one party had consigned goods with another, and the goods were damaged during shipment. *Id.* at 315. Addressing which party owned the goods and thus would bear the loss, the Court noted that "if, by the terms of the contract . . . the title to the goods vested in" one party, then he would be accountable for the loss. *Id.* at 322. In the absence of any explicit statement as to ownership, the Court held that the consignee was not the owner of the goods, since, *inter alia*, he was bound to return the identical items if he could not sell them. *Id.* at 329-30 (citing *Burkhardt*); *see also B.A. Ballou & Co. v. Citytrust*, 218 Conn. 749, 754 (Conn. 1991) (finding no bailment of scrap metal where a contract was silent as to ownership and distinguishing *General Motors Corporation v. Bristol*, 690 F.2d 26, 30-31 (2d Cir. 1982) on the ground that "the written agreement clearly stated that GM retained title to the scrap in the manufacturer's possession").

As these cases show, "in interpreting bailment contracts, an express agreement will prevail against general principles of law applicable in the absence of an express agreement, and it is improper to imply obligations except in the absence of express contractual terms." 8A AM. JUR. 2d Bailments § 29; *see also In re Bruening*, 113 F.3d 838, 840-41 (8th Cir. 1997) ("the parties' intent will determine how this business arrangement [either bailment or sale] ought to be characterized"); *Bristol*, 690 F.2d at 30 (Mansfield, J., concurring) ("When commingling is required by the needs of the trade and is done with the consent of the parties a bailment is established if that is the intent of

the parties."); *Diehr v. Thompson Chems. Corp.*, 281 S.W.2d 572, 577 (Mo. 1955) ("the contract between the parties, rather than the mere commingling, determines the nature of transactions [either bailment or sale] involving fungible goods").[20]

Eurodif's SWU contracts expressly set forth the parties' intent: that the utilities retain title and ownership to uranium throughout the enrichment process. C.J.A. 17, 87, 140, 188, 267.[21] Accordingly, the doctrine of bailment provides no basis for treating them as if they effectuated a sale.

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[20] The sole case cited by petitioners, *see* USEC Br. 47-48 n.12, suggesting that the parties' intent does not control whether a bailment arises, is contrary to settled authority and, in any event, the suggestion was mere dicta. In *Sitkin v. R-One Alloys, Inc.*, No. C.A. PB 04-0495, 2006 WL 625273 (R.I. Super. Ct. Mar. 16, 2006) (unpublished), the contract expressly provided that "customer shall have no further rights in respect to any material," *id.* at *5, just as the court found. While the court stated that its "decision does not rest primarily on the language of the [contract]," *id.* at *6, it never addressed the language in *Burkhardt* and *Sturm* establishing that the parties' intent is dispositive.

[21] To the extent the United States now suggests that the feed furnished by utilities is consideration for LEU, *see* Gov't Br. 48, it is incorrect. Commerce itself correctly recognized the infirmity of this position in its final determination. *See* Gov't Pet. App. 254a. Utilities provide their feed uranium to enrichers only so that it can be enriched into LEU. The feed is not a form of payment, but a raw material in need of processing. It is temporarily provided to enrichers, not for their benefit, but because they perform the necessary services.

3. The Courts, at the United States' Behest, Have Consistently Treated SWU Transactions as Sales of Services, Not Merchandise.

Petitioners' current position that section 1673 covers SWU transactions is especially hollow in light of their prior recognition that such transactions are sales of enrichment services, not LEU—a position the United States has successfully maintained in at least three prior cases. *See Fla. Power*, 307 F.3d at 1371-74; *Centerior Serv. Co. v. United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997).

In both *Barseback* and *Centerior*, the United States argued on behalf of USEC, which was then government-owned, that the Uniform Commercial Code does not apply to SWU contracts because no sale of goods is involved.[22] *See* J.A. 124-25. The court agreed in both

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[22] The United States' brief in *Barseback* tied this conclusion to the contractual pricing for SWU transactions:

> "[T]he price that [utilities] pay is . . . based solely on the number of SWUs needed to enrich natural uranium to the level they desire. There is no charge for the uranium itself. Thus, although customers receive enriched uranium from USEC, they have contracted only for the enrichment services associated with such uranium."

J.A. 125. The same is true of the pricing in Eurodif's SWU contracts.

instances. *See Barseback*, 36 Fed. Cl. at 705 ("It is clear . . . that the customers are contracting for services, not goods, from . . . USEC."); *Centerior*, 1997 U.S. Claims LEXIS 323, at *19 (holding the UCC inapplicable because SWU contracts "are for uranium enrichment services").

The United States successfully took the same position in *Florida Power*, 307 F.3d at 1364. There, the question was whether SWU contracts were covered by the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, which "does not apply to the provision of services." *Fla. Power*, 307 F.3d at 1371, 1373. The SWU contracts at issue there expressly provided that title to uranium feed transferred from the utilities to the enricher pending enrichment. Dismissing this title transfer as a "technicality," the United States argued, and the *Florida Power* court held, that SWU transactions are sales of the service of enrichment, not of goods.[23] 307 F.3d at 1373; Gov't Pet. App. 20a-21a. Eurodif's SWU contracts present an even easier case: they provide that the utilities retain title to their feed, rather than transferring it to the enricher. There can be no question that they are contracts for sales of services.

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[23] This Court, too, has characterized SWU transactions as ones for services, not goods. *See Huffman*, 486 U.S. at 665 ("Congress . . . authorize[d] the AEC to offer 'toll enrichment' services whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee.").

B. SWU and EUP Contracts Are Not Functionally Equivalent.

In claiming that to fulfill the purpose of the antidumping law it may be construed to reach SWU transactions, petitioners repeatedly suggest that SWU and EUP contracts are "functionally equivalent" and "essentially the same." USEC Br. 20; *see also* Gov't Br. 10-11; Gov't Pet. App. 255a. But aside from the fact that both types of transactions result in delivery of LEU, they are completely different contractual arrangements.

First, as explained above, SWU and EUP contracts differ with respect to which party owns the uranium that is enriched. *See supra* Point II.A. Most notably, EUP contracts provide for a "transfer" or "pass[age]" of title in the complete LEU product, C.J.A. 333, 392; in SWU contracts, utilities retain title to their feed during the enrichment process and until they have title to the associated LEU. *See* C.J.A. 17, 87, 140, 188, 267.

Second, SWU and EUP transactions entail markedly different commercial consequences and risks for utilities and enrichers. In EUP transactions, enrichers, not utilities, must acquire and incur the cost of the necessary uranium feed. *See* Gov't Pet. App. 204a. Accordingly, the price in EUP transactions is determined per kilogram of LEU, and covers all components of the LEU's value. *See id.* at 46a-47a, 204a-05a. By contrast, a utility must acquire uranium feed under a SWU contract, and the price term reflects only the value of enrichment. This distinction between the two types of contracts is especially significant given that uranium prices can swing dramatically over short

periods of time (*e.g.*, between 2003 and 2007, from $10/lb. to more than $130/lb.). *See* Ux Consulting, *Ux Current and Historical Price Indicators*, *at* http://www.uxc.com (last visited Sept. 14, 2008).[24]

SWU transactions and EUP transactions also offer utilities very different levels of control over LEU costs. In SWU transactions, utilities can manage the balance between feed and SWUs in order to minimize costs; they cannot do so in EUP transactions. More broadly, as the CIT recognized, SWU transactions allow utilities to manage and allocate the substantial risks involved in obtaining LEU by purchasing each step in the enrichment process separately and diversifying the sources for those steps. Gov't. Pet. App. 55a-56a.

Without such flexibility, utilities could face a disruption of their supply of nuclear fuel because of another party's failure to manage risk. For example, in the 1970s, following an 800% increase in the cost of uranium, Westinghouse Electric Corporation renounced its contracts to deliver finished fuel assemblies containing enriched uranium, claiming commercial impracticability. *See In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994 (10th Cir. 1977). As a result, utilities determined that it would be better for them to assume, and therefore manage, the risks of nuclear fuel procurement by controlling each step in the process. J.A. 273.

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[24] This assumption of risk is further confirmation that, as a matter of economic substance, SWU and EUP transactions are not equivalent. *See Frank Lyon*, 435 U.S. at 576-80.

C. Commerce's Methodology for Determining That LEU Was Dumped Confirms That the Antidumping Law Cannot Be Applied to Eurodif's SWU Transactions.

The methodology used by Commerce to determine that LEU had been sold at less than fair value in Eurodif's SWU transactions is contrary to the detailed directives set forth in the antidumping law. As Commerce acknowledged, a sale is cognizable under the antidumping law only if it reflects "100 percent of the value of the subject merchandise." Gov't Pet. App. 155a. While Commerce paid lip service to this statutory mandate, SWU prices indisputably do not reflect the full value of finished LEU. Thus, Commerce's calculations were a charade, underscoring that the antidumping law cannot be applied to these SWU contracts.

Commerce sought to "translate[ ]" Eurodif's enrichment prices and costs to a figure that would reflect the price of finished LEU "by adding a value for the uranium feedstock." J.A. 248. It "assign[ed] a specific monetary value to the natural uranium component," and added that amount both to Eurodif's price of enrichment services provided to U.S. utilities, and the constructed value of enrichment services in France. Gov't Pet. App. 257a. Since the values assigned to uranium were identical for both U.S. price and normal value, those values canceled out in the "fair value" comparison. In reality, Commerce compared only Eurodif's SWU prices and costs to determine that LEU itself had been dumped.

Commerce acknowledged that no statutory provision directly authorized this approach, but determined that the absence of such a provision did not prohibit it from acting. *See id.* at 155a, 233a. That conclusion was incorrect.[25]

Moreover, Commerce's methodology was inconsistent with explicit statutory language governing the calculation of U.S. price and normal value. In calculating the U.S. price of subject merchandise, Commerce must begin with "the *price* at which the *subject merchandise* is first *sold*." 19 U.S.C. § 1677a(a),(b) (emphasis added). The foreign side's normal value calculation similarly begins with "the price at which the foreign like product is first sold" or—where Commerce calculates a constructed value (due to the absence of available sales) as it did here—the seller's "cost of," *inter alia*, "materials . . . in producing the merchandise." *Id.* § 1677b(e)(1), (a)(1)(B)(i). Commerce then is directed to make certain adjustments to these figures, each of which is specifically enumerated in the statute. *Id.* §§ 1677a(c)-(d), 1677b(a)(6)-(8), (e).[26]

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[25] *See FAG Italia, S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("the absence of an express statutory provision cannot be interpreted as giving an agency authority") (*citing S. Cal. Edison Co. v. Fed. Energy Regulatory Comm'n*, 195 F.3d 17 (D.C. Cir. 1999)).

[26] Authorized adjustments include, for example, increasing the U.S. price to reflect "the cost of all containers" used to prepare the merchandise for shipment, 19 U.S.C. § 1677a(c)(1)(A), and reducing the price to account for additional costs, charges and expenses, and U.S. duties, attributable to shipping the merchandise to the point of delivery in the United States. *Id.* § 1677a(c).

Commerce flouted these statutory requirements. It did not base its calculation of U.S. price on an actual price of LEU in SWU transactions, since Eurodif never charged such a price. Similarly, Commerce did not base its constructed value on Eurodif's actual costs of materials in producing LEU, since Eurodif bore no feed costs. And Commerce's addition to Eurodif's actual prices and costs of an assigned value for uranium is not among the adjustments authorized by the statute.

In short, while petitioners urge this Court to focus on economic realities, Commerce itself ignored economic reality in determining that LEU was sold at a dumped price in SWU transactions. The truth is that Eurodif did not sell or charge *any* price for LEU, discriminatory or otherwise. Commerce distorted Eurodif's actual pricing behavior—and disregarded clear statutory language governing the calculation of U.S. price and normal value—in order to impose the antidumping law on transactions it was never intended to cover.

D. Commerce's Effort to Recharacterize Eurodif's SWU Transactions as "Merchandise . . . Sold" Is Wholly Unreasonable.

The antidumping law unambiguously precludes the imposition of dumping duties where, as here, no sale of merchandise has occurred. But even if the statutory language could somehow be deemed ambiguous, Commerce's application below could not survive the second step of a *Chevron* analysis because it is not "a reasonable policy choice for the agency to make." *Brand X*, 545 U.S. at 986 (internal quotation marks omitted).

Commerce's characterization of Eurodif's SWU transactions has no basis in the record and is thus unreasonable. Both the form and substance of the SWU contracts at issue here clearly reflect a sale of processing services alone, and effectuated no transfer of ownership in uranium feed or LEU. *See supra* Point II.A.

Petitioners' construction of the term "merchandise . . . sold" is also unreasonable because it severs the critical connection between *selling* merchandise and *setting the price* of that merchandise. Petitioners never argue, nor could they, that a sale of enrichment processing alone could trigger dumping duties. They claim, rather, that "it is in fact a complete LEU product that is 'sold' as a result of a SWU contract, and not only the enrichment component." Gov't Br. 48. It is undisputed, however, that in SWU transactions, Eurodif set a price for only enrichment services. It charged no price (and incurred no cost) for uranium; Commerce simply assigned an artificial value to account for that component. Because Eurodif set the price for only processing services, not for the full value of LEU, it had no opportunity to engage in price discrimination with respect to LEU.

Finally, Commerce has not justified its abrupt and *post hoc* withdrawal of its tolling regulation. Commerce has repeatedly recognized, in both its regulation and numerous decisions, that transactions between a toller and tollee are not sales of merchandise and thus are not cognizable under the antidumping law. Nowhere in Commerce's notice withdrawing the regulation or in the United States' brief to this Court is there any attempt to account for the crucial fact that led Commerce to

adopt the tolling regulation in the first place—that tollers are not price-setters, and thus not price-discriminators (or sellers), for subject merchandise. Accordingly, even if this Court were to find some ambiguity in section 1673, it should reject Commerce's interpretation of that provision under step two of *Chevron*.

III. The Federal Circuit's Decision Has No Undesirable Policy Consequences.

A. The Decision Below Does Not Permit Evasion of the Antidumping Law.

Contrary to petitioners' and amicus curiae CSUSTL's claims, affirming the judgment below would not permit circumvention of the antidumping law. *See* Gov't Br. 34-37; USEC Br. 23-24, 53-54; CSUSTL Br. 20-22. Petitioners argue that, under the Federal Circuit's holding, parties could theoretically structure a transaction as separate purchases of raw materials and manufacturing to avoid dumping duties. They do not suggest, nor could they, that SWU transactions were in fact structured for that purpose. As noted, SWU transactions were developed by the U.S. government pursuant to a statutory directive, and became standard practice in the enrichment industry long before any issue regarding the antidumping law arose. *See supra* at 7. Moreover, Commerce has means to address actual strategic circumvention of antidumping restrictions, *see* 19 U.S.C. § 1677; but Eurodif has not engaged in, and Commerce does not allege, any such conduct here.

In any event, the possibility that production could be segmented into separate transactions for raw materials and processing does not render the antidumping law inapplicable in circumstances where the merchandise is ultimately sold. Indeed, in Commerce's prior tolling cases, which involved a subcontractor's sale to a contractor (or tollee) of processing or inputs to raw materials, the agency found dumping based upon the tollee's downstream sale of the finished goods. *See, e.g., Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68853 (Dep't Commerce Dec. 29, 1993); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6526 (Dep't Commerce Feb. 9, 1998) (prelim. admin. review); *Certain Pasta from Italy*, 63 Fed. Reg. 53641 (Dep't Commerce Oct. 6, 1998); *SRAMs Remand Determination in response to the Court of International Trade's remand in Taiwan Semiconductor v. US*, Slip Op. 00-48 (Jun. 2, 2000), *available at* http://ia.ita.doc.gov/remands/00-48.htm.

The United States now claims, however, that downstream sales by a tollee cannot "be used to calculate dumping margins" absent an "allegation that the foreign seller is affiliated with the U.S. purchaser." Gov't Br. 37. The United States is simply wrong. The earlier tolling cases involved unaffiliated tollers and tollees, and Commerce had no trouble relying on tollees' downstream sales to impose dumping duties there. *See, e.g., Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68853 (Dep't Commerce Dec. 29, 1993); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6526 (Dep't Commerce Feb. 9, 1998); *Certain Pasta from Italy*, 63 Fed. Reg. 53641

(Dep't Commerce Oct. 6, 1998); *Taiwan Semiconductor, supra.* Indeed, in this very case, Commerce suggested that if the utilities (*i.e.*, the tollees) sold, rather than consumed, LEU, the antidumping law would reach those sales. *See* Gov't Pet. App. 124a.

Alternatively, if the United States' reference to downstream sales is intended to refer to tolled merchandise that is further transformed or manufactured in the United States, such a claim is equally wrong. The statute expressly provides a means for determining U.S. price in such circumstances. *See* 19 U.S.C. § 1677a(b),(d)(2).

B. The Broader Ramifications of the Decision Below Favor Affirmance.

1. Reversal Is Not Required to Protect U.S. Energy or National Security Interests.

According to petitioners, unless the Court reverses the decision below, Russia will have an "incentive to direct its enrichment capacity toward commercial enrichment . . . for the U.S. market, rather than downblending weapons-grade uranium." Gov't Br. 39; *see also* USEC Br. 18-19. USEC further contends that the threat of Russian LEU imports could undermine its plans to build a new enrichment plant, as well as the plans of another enricher to build a U.S. plant. USEC Br. 58.[27]

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[27] USEC no longer claims, as it did in its petition for certiorari, that affirming the court below "would . . . threaten the viability of [its] existing U.S. enrichment plant." USEC Pet. (Cont'd)

In the first place, these concerns have no bearing on the meaning of a statute enacted long before the process of nuclear fission was even discovered. Rather, they should be addressed, if at all, by Congress. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 (2007) (whether a statute's supposed "undesirable consequences" warrant a change in law "is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court"). And indeed, Congress is currently considering legislation that would address precisely these concerns by limiting Russian imports of LEU. *See* Energy and Water Appropriations Bill, 2009, S. 416, 110th Cong. § 2 (2008); Otto Kreisher, *Senate Panel Passes $488 Billion Defense Spending Bill*, CONGRESSDAILY, Sept. 10, 2008.

Moreover, petitioners' contentions about the potential ramifications of the decision below are unpersuasive on their merits. Even absent legislative action, the United States has ample authority to deal with Russian LEU imports without resorting to a distorted application of the antidumping law.

(Cont'd)

App. 36. In any event, USEC is not, as it suggests, critical to the United States' ability to meet its nuclear defense needs. *See* USEC Br. 55. The U.S. Navy acquires fuel for nuclear-powered submarines not from USEC, but rather from downblending U.S. HEU stockpiles, which have been certified as sufficient to meet those needs for at least 40 years. *See* Daniel Horner, *Babcock & Wilcox to Acquire Downblending Competition*, NUCLEARFUEL, 2008 WLNR 17017489, Aug. 25, 2008, at 3; *see also* Secretary of Energy's Policy Statement on Management of Excess Uranium Inventory, at 1, *available* at http://www.ne.doe.gov.

See 50 U.S.C. § 1702(a)(1)(B) (authorizing President to "regulate, . . . prevent or prohibit, any . . . importation or exportation of . . . any property in which" a foreign national or country has an interest); 19 U.S.C. § 1862(c)(1)(A)(ii) (authorizing President to "adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security").[28]

In fact, the outcome that petitioners seek poses its own risks. USEC alone cannot satisfy U.S. demand for enrichment.[29] If petitioners prevailed here, foreign enrichers might reconsider their participation in the U.S. market, in which event Russian enriched uranium could become even more essential to utilities' nuclear needs.

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[28] As noted in Eurodif's opposition to the certiorari petitions, President Clinton previously utilized such authority to issue an executive order under one of these provisions to ensure "the full implementation of the [HEU] Agreement." Exec. Order No. 13,159, 65 Fed. Reg. 39,279 (June 21, 2000). That executive order has been renewed each year since. *See, e.g.*, Notice of President, 73 Fed. Reg. 35,335 (June 18, 2008).

[29] USEC's planned production for 2008 is approximately 6 million SWUs, USEC Inc., 2007 Annual Report (Form 10-K), at 6 (Feb. 26, 2008), *available at* http://216.139.227.101/interactive/usu2007/; whereas U.S. demand for 2008 is projected to be 14.5 million SWUs, Haruo Maeda, *The Global Nuclear Fuel Market Supply and Demand 2007-2030*, at 84, Table 3.5 (World Nuclear Ass'n 2006).

2. The Decision Below Avoids Conflict with the United States' International Obligations and Potential Retaliation Against U.S. Companies.

The United States' antidumping law is intended to implement Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT"). *See* Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§3501 *et seq.*, plus scattered sections of 19 U.S.C.). Article VI of GATT permits dumping duties to be assessed only on sales of products, not on sales of services or processing alone.[30]

If this Court were to reverse the decision below, the ensuing imposition of dumping duties on the sale of enrichment processing would conflict with the United States' international obligations under Article VI. Such a conflict could have significant ramifications, including retaliation against U.S. exports. Moreover, should other nations adopt a similarly elastic interpretation of sales of merchandise, U.S. companies might face penalties in foreign markets.

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[30] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Org., Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125, 1141 (1994).

3. The Decision Below Allows for Appropriate Competition in the U.S. Enrichment Services Market.

This Court should decline petitioners' invitation to expand the reach of the antidumping law in a manner that would further undermine competition—the cornerstone of our nation's antitrust laws—in the absence of any Congressional mandate to do so. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) (rejecting an interpretation of the Federal Power Act that would "override the fundamental national policies embodied in the antitrust laws").

As this Court has repeatedly observed, price competition is the "central nervous system" of the free-enterprise system. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)). Primarily for this reason, when competitors complain about pricing, the antitrust laws restrain price discrimination only when predatory pricing can be shown. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-26 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590-91 (1986). Absent predation, lower prices benefit consumers and there is no injury to competition under the antitrust laws. *See, e.g., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, ___ U.S. __, 127 S.Ct. 1069, 1074 (2007); *Brooke Group*, 509 U.S. at 224-26.

Unlike the antitrust laws, the antidumping law requires no predation, predatory intent, threat to

competition, or actual anticompetitive effects to impose pricing controls that have the effect of raising import prices for U.S. consumers. *See* 19 U.S.C. § 1673. Thus, as this case illustrates, the antidumping law shields domestic industries from foreign price competition without regard to the competitive marketplace or to consumer welfare. As the Congressional Budget Office observed, the "U.S. antidumping law imposes added duties on imports . . . where price discrimination by the foreign exporter benefits the United States economically." CONGRESSIONAL BUDGET OFFICE, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY POLICY 8 (1994).

Congress cabined the antidumping law to reach only sales of "foreign merchandise," 19 U.S.C. § 1673(1), and in all other respects, Congress has permitted competition with foreign industries to flourish. Were the Court to expand the application of the antidumping law to sweep in sales of processing services, as petitioners urge, those principles of competition would be undermined. Just as this Court has construed the Robinson-Patman Act's price-discrimination controls narrowly to do minimal violence to the antitrust laws and avoid causing unintended harm to consumers, *see Great Atlantic & Pacific Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69, 80 & n.13 (1979), the Court should construe the antidumping law consistent with its unambiguous terms to preserve the limits Congress placed on its intrusion on the free-enterprise system.

CONCLUSION

For the foregoing reasons, this Court should affirm the Federal Circuit's judgment.

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